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Visualizing a New Artists' Rights Act: When Does the Law Protect Graffiti?

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— Note —

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INTRODUCTION

For over twenty years, a Queens neighborhood was home to what was hailed as the "world's largest open-air aerosol museum."[1] Located on the walls of the 5Pointz complex, the collection of graffiti murals initially represented the unique collaboration between the warehouse's real estate developer and graffiti artists to transform their neighborhood into a "thriving residential enclave."[2] This changed, however, in 2013, when the developer planned to demolish the 5Pointz warehouse, and consequently the graffiti covering its wall, and build luxury, high-rise condos.[3]

Amid the conflict, the artists sought a legal remedy to protect their graffiti. The artists filed for a preliminary injunction to prevent the developer from demolishing the warehouse.[4] The United States District Court for the Eastern District of New York, however, denied the artists of injunctive relief but announced that the court would issue a written opinion to explain its reasoning.[5]

Although the developer had won this legal battle, the developer then took a misstep that would cost millions. Rather than wait just eight days for the court's written opinion, the developer whitewashed the warehouse, effectively destroying the artists' graffiti.[6] Subsequently, the developer found himself back in court.

In this second legal battle, the court held that destroying the graffiti violated the Visual Artists Rights Act ("VARA"),[7] which provides artists with rights both to protect their artwork and reputation and to seek monetary damages if their art is intentionally damaged. The court described the developer's conduct as "precipitous"[8] and the "epitome of willfulness."[9] The court may have originally denied the artists'

1. Alan Feuer, *Brooklyn Jury Finds 5Pointz Developer Illegally Destroyed Graffiti*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/nyregion/5pointz-graffiti-jury.html [https://perma.cc/7X2F-BZRY].

2. *Id.*

3. Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018), *appeal filed*, No. 18-538 (2d Cir. Feb. 23, 2018).

4. *Id.*

5. *Id.*

6. *Id.*

7. 17 U.S.C. § 106A (2012).

8. *Cohen*, 320 F. Supp. 3d at 445.

9. *Id.*; *see also id.* at 443 (explaining that the developer testified in court that he was aware of VARA and, further, that he knew that the artists

preliminary injunction, but the court did not give the developer the right to destroy the graffiti murals. The developer's conduct was "an act of pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art."[10]

Though their art was destroyed, the 5Pointz case marks a victory for artists' rights under VARA. Notably, this is the first time that a court has declared that artists' graffiti can be worthy of protection under the law.[11] Furthermore, the court awarded twenty-one artists $6,750,000 for the destruction of their graffiti murals.[12] As this Note describes, however, the court's progressive holding for the graffiti artists at 5Pointz is the exception and not the rule.

This Note discusses VARA, a federal statute under the Copyright Act enacted to provide artists with greater rights to protect their artwork.[13] Specifically, this Note focuses on VARA's limitations in protecting artists' rights and argues that VARA works to the disadvantage of many artists, especially those with publicly displayed art. Additionally, this Note discusses the limited protections that artists have against the government when the government violates artists' VARA rights. Due to these limitations and inadequate protections that currently exist for artists under VARA, this Note recommends modifications to VARA to better achieve its intended goals.

Part I introduces VARA and describes the rights VARA provides to artists and the justifications of those rights. Part I also discusses VARA's limitations in terms of what constitutes a work of art, how VARA violations are avoided, and how VARA rights may be waived. Part I concludes with an analysis of how VARA's limitations contradict the statute's purpose to provide artists greater rights. Parts II and III argue that the government can often disregard the artists' VARA rights. Part II considers whether state governments are immune from VARA violations. Part III introduces the government speech doctrine and explains how the doctrine further limits artists' rights in their public artwork. Part IV explains how VARA, along with states' immunity from VARA and government speech, harms most artists and society more than it helps. Finally, Part V recommends several amendments to VARA that would better suit both artists and society.

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were attempting to assert their rights and pursue remedies under VARA when they applied for the injunction).

10. *Id.* at 445.

11. *Id.* at 427 (quoting Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013)).

12. *Id.* at 447–48.

13. 17 U.S.C. § 106A (2012).

I. The Visual Artists Rights Act

In 1932, Nelson Rockefeller commissioned Diego Rivera to construct a mural in Rockefeller Center. Construction of "Man at the Crossroads" began in March 1933.[14] Shortly thereafter, however, tension grew between Rockefeller and Rivera due to the political implications of the mural, namely that, among other details, the mural included an image of Vladimir Lenin.[15] When Rockefeller asked Rivera to remove this image of Lenin, Rivera refused. On May 22, 1933, Rockefeller paid Rivera in full but banned Rivera from completing his work. In early 1934, prior to its completion, Rivera's mural was destroyed and "chiseled off the wall."[16]

At the time of the "Man at the Crossroads" dispute, American artists did not have statutory protections for moral rights—an artist's right to the physical integrity of his artwork even when another owns the art. Rockefeller owned Rivera's unfinished mural. Therefore, Rockefeller was "legally entitled to destroy it."[17]

A. Justifications for VARA

It was not until 1990 when Congress enacted VARA[18] that artists had the "power to protect their artworks from destruction, mutilation or misattribution."[19] With VARA, an artist can prevent the destruction of his artwork—even artwork he no longer owns.[20]

Like the goals of copyright laws that are articulated in the United States Constitution, VARA was enacted "[t]o promote the Progress of

14. Annette Labedzki, *Man at the Crossroads: The Rockefeller Controversy*, The Virtual Diego Rivera Web Museum, http://www.diegorivera.com/?p=60 [https://perma.cc/6EA3-GJUP] (last visited Aug. 28, 2018).

15. *Id.*; *see also* Allison Keyes, *Destroyed by Rockefellers, Mural Trespassed on Political Vision*, NPR (Mar. 9, 2014, 9:00 AM), https://www.npr.org/2014/03/09/287745199/destroyed-by-rockefellers-mural-trespassed-on-political-vision [https://perma.cc/XA2Y-GZHZ].

16. Keyes, *supra* note 15; *see also* Labedzki, *supra* note 14.

17. Natalia Thurston, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 Berkley Tech. L.J. 701, 701 (2005).

18. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106A (2012)).

19. Matthew Swanlund, *What is the Visual Artists Rights Act (VARA)?*, Aesthetic Legal (June 6, 2016), https://aestheticlegal.com/vara/ [https://perma.cc/UUG9-79EF].

20. 17 U.S.C. § 106A.

Science and useful Arts."[21] To do so, VARA was enacted with both private and public considerations in mind.[22]

Specifically, VARA cultivates a "climate of artistic worth and honor that encourages the author in the arduous act of creation."[23] This allows artists to protect their reputations and artistic brands.[24] Further, VARA encourages artists to share and sell their art because VARA protects artists' art and provides artists with recourse if their art is modified or destroyed.

With the creation of new artwork and the preservation of existing artwork, the public also benefits.[25] VARA "preserve[s] the artistic heritage for the benefit of society on the principle that living and working among works of art has positive societal effects."[26] In the House Report, the Committee on the Judiciary explained the societal importance of preserving art and encouraging artistic expression:

> Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly.
>
> Therefore, . . . it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.[27]

21. H.R. REP. NO. 101-514, at 5 (quoting U.S. CONST. art. I, § 8, cl. 8).

22. P. Cunard, *Moral Rights for Artists: The Visual Artists Rights Act*, 27 CAA NEWS, no. 3, 2002, at 6.

23. H.R. REP. NO. 101-514, at 5 (quoting *The Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 32 (1989) (statement of Robert W. Oman, Register of Copyrights, Library of Cong.)).

24. Interestingly, other countries do not provide moral rights to works of art that are completely destroyed on the grounds that destruction cannot prejudice the "artist's honor and reputation in the way that an existing work which misrepresents the artist can." Cunard, *supra* note 22, at 6–7.

25. H.R. REP. NO. 101-514, at 10 (quoting *The Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 83 (1989) (statement of Jane Ginsburg, Associate Professor, Columbia University School of Law)).

26. Cunard, *supra* note 22, at 6.

27. H.R. REP. NO. 101-514, at 6 (statement of Rep. Markey).

B. Moral Rights

VARA's justifications are codified as *moral rights*.[28] The *right of integrity* provides artists with the ability to prevent the destruction or modification of their artwork, even when another person owns the works of art.[29] On the other hand, the *right of attribution* provides artists the right to retain authorship of works they created and also disclaim authorship of works of art that were modified or destroyed.[30]

Unlike property or ownership rights, moral rights are "rights of a non-economic, spiritual or personal nature, existing independently of an artist's copyright."[31] In a way, VARA rights are more expansive than property rights because an artist retains moral rights in his artwork even after he transfers his ownership to another.[32]

C. VARA's Limitations

VARA does not apply to all works of art; rather, it protects art only in limited circumstances.[33] The following sections discuss various limitations on VARA's scope.

1. Limitations Defined by Statute

First, VARA provides an artist moral rights to his work only if that work is considered visual art that exists in single copies or limited editions. A work of visual art is defined as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a *limited edition of 200 copies or fewer* that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

28. H.R. REP. NO. 101-514, at 1; *see also* Thurston, *supra* note 17, at 703 ("Congress' impetus in codifying the moral rights of attribution and integrity however stemmed from its desire to spur creation of new works as well as to preserve existing works for the public's cultural benefit.").

29. H.R. REP. NO. 101-514, at 14, 24.

30. H.R. REP. NO. 101-514, at 14.

31. Swanlund, *supra* note 19.

32. *See* Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 299, 302–03 (2003) (describing moral rights as personal rights, as opposed to intellectual property rights, which provide artists economic incentives to generate works of art).

33. 136 CONG. REC. 36951 (1990) (statement of Rep. Moorhead).

> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a *limited edition of 200 copies or fewer* that are signed and consecutively numbered by the author.[34]

Second, the definition of a work of visual art excludes specific items, such as maps, posters, technical drawings, books, magazines, and electronic information services. Items for merchandising or advertisement and any work made for hire are also not works of art for the purposes of VARA.[35]

2. Recognized Stature Limitations

Beyond the statutory limitations, only art of "recognized stature" is afforded VARA protections.[36] What constitutes "recognized stature" has been a point of controversy because VARA fails to provide a definition or any clarification.[37]

In *Carter v. Helmsley-Spear, Inc.*,[38] the United States District Court for the Southern District of New York explained that the "recognized stature" language in VARA serves as a "gate-keeping mechanism" for determining which works of art qualify for VARA protections and which works of art do not.[39] The *Carter* court provided a two-tier test to determine when a work of art is of "recognized stature."

First, the work of art must be "meritorious."[40] While the court did not explicitly define "meritorious," it explained that, to have artistic merit, the work of art does not need to be of the same caliber as Picasso's paintings nor does it have to be aesthetically pleasing.[41] That said, the work of art has to have creative value beyond that of a promotional display.[42] Second, the work of art's stature must be recognized "by art experts, other members of the artistic community,

34. 17 U.S.C. § 101 (2012) (emphasis added).

35. *Id.*

36. § 106A(a)(3)(B); *see also* Swanlund, *supra* note 19.

37. Cunard, *supra* note 22, at 6–7.

38. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part on other grounds*, 71 F.3d 77 (2d Cir. 1995).

39. *Id.* at 324–25.

40. *Id.* at 325.

41. *Id.*

42. Pollara v. Seymour, 206 F. Supp. 2d 333, 337 (N.D.N.Y. 2002), *aff'd*, 344 F.3d 265 (2d Cir. 2003).

or by some cross-section of society."[43] As a result, this gate-keeping mechanism limits VARA to works of art that the artistic community, experts in the field, or society at large consider to be of a heightened caliber, prominence, or importance.[44]

3. Temporal Limitation

VARA is temporally limited in several respects. To start, VARA rights apply only during the life of the artist.[45] Where more than one artist created a single work of art, VARA rights apply until the death of the last surviving artist.[46]

Further, VARA generally does not protect works of art created before 1990, the year the law was enacted.[47] If, however, a work of art was created prior to 1990 and the artist is still alive, then VARA rights apply. This exception has a caveat though—the artist could not have transferred ownership of their work of art prior to 1990.[48]

Additionally, an artist may not transfer his VARA rights to another.[49] This limitation is consistent with VARA's goals because VARA's justifications are focused on protecting the artist's efforts and reputation, not the subsequent owner of the art. Moral rights are derived from the artist's creativity and commitment to the artistic process, not from a third party's artistic vision or reputation.[50]

On the other hand, there is an argument for allowing an artist's moral right to remain attached to his artwork after his death. If this were the case, then many of VARA's benefits would perpetuate. The artist's reputation would remain linked with his artwork in its original

43. *Carter*, 861 F. Supp. at 325.

44. *Id.*; *see also* Thurston, *supra* note 17, at 714 ("Under VARA, art is protected if it is accepted by the public, as only works of recognized stature are protected.").

45. 17 U.S.C. § 106A(e) (2012); *see also* Thurston, *supra* note 17, at 720 (quoting JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 27 (1999)) ("As for the rights of artists, they would have to be stretched pretty far to include a right to compel unwilling people to experience their work far into the indefinite future, which would be the practical result if a large sculpture . . . must remain in a public and unavoidably frequented place.").

46. § 106A(d)(3).

47. § 106A(d) (explaining that the act does not take effect until six months after the date of enactment, December 1, 1990).

48. § 106A(d)(2).

49. § 106A(e).

50. H.R. REP. NO. 101-514, at 5 (1990); *see also* Thurston, *supra* note 17, at 706 ("Because moral rights flow from the artist's creative process and personality vested in the work, moral rights are inalienable and non-transferable. Moral rights are, however, waivable via written contract.").

form over time. Further, because the artwork would remain unchanged, society would continue to benefit from the artwork's present cultural significance or historical value.

4. Made-for-Hire Limitation

VARA rights do not apply to art that is made for hire. A work made for hire is defined as "a work prepared by an employee within the scope of his or her employment," or "a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[51] For example, if an employee is tasked with the creation of a specific sculpture for the lobby of the company office building, then VARA rights likely would not apply to the sculpture because the employee's sculpture was made for hire.

To determine whether an artist is an employee creating his employer's work of art, rather than a contractor creating his own artwork, a court will consider the extent that the hiring party has control over the creation of the work of art.[52] In addition, a court may consider whether the artist receives employee benefits or owes employment taxes and whether the hiring party assigns additional tasks to the artist.

In *Carter v. Helmsley-Spear, Inc.*,[53] the Second Circuit held that a sculpture did not fall under the protections of VARA because it was a work made for hire.[54] Specifically, the court found that the artists were treated as employees because they agreed to perform additional work tasks and received substantial material from the hiring party. On behalf of the artists, the hiring party paid payroll and security taxes; provided life, health, and liability insurance; and allowed the artist to earn paid vacations, contribute to the unemployment insurance and worker's compensation funds, and even apply for unemployment benefits after the project was complete.[55]

On the other hand, an artist's personal project is not made for hire just because there is an agreement that the work is built on another's property. In *Martin v. City of Indianapolis*,[56] the United States District Court for the Southern District of Indiana found that an artist's

51. 17 U.S.C. § 101 (2012) (defining "work of visual art" and explaining that a work of visual art does not include, among other items listed, any "work made for hire").

52. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989).

53. 71 F.3d 77 (2d Cir. 1995).

54. *Id.* at 88.

55. *Id.* at 86–87.

56. 982 F. Supp. 625 (S.D. Ind. 1997), *aff'd*, 192 F.3d 608 (7th Cir. 1999).

stainless-steel sculpture, located on another's land, was not a work for hire.[57] The court considered several factors in reaching this conclusion: the fact that the artist was not paid for the sculpture; the number of hours devoted to making the artwork (including weekends and holidays); the length of time it took the artist to make the art (suggesting a lack of urgency); the fact that the property owners were only involved in the mechanical installation of the project; and the fact that the artist signed a contract with the owner of the land explaining that the artist owned the sculpture.[58]

D. What Constitutes Destruction or Modification

After determining that an artist's work of art qualifies for protection under VARA, the artist faces additional obstacles when pursuing a VARA claim. Notably, certain modifications to a work of art do not constitute violations of VARA. For example, modifications to the art that result from "the passage of time or the inherent nature of the materials" do not constitute a violation of VARA.[59] The following subsections discuss two occasions when modification of a work of art does not amount to a VARA violation.

1. Relocation

Relocating works of art does not violate VARA. In *Phillips v. Pembroke Real Estate, Inc.*,[60] for example, a sculptor asserted that his work was "site-specific" and that "the location of the work [was] an integral element of the work."[61] Thus, the sculptor claimed that the removal of his art from its original site, a park, would violate his moral rights granted under VARA.[62] However, the First Circuit reasoned that providing site-specific VARA protections reaches beyond VARA's statutory language.[63] The court explained, "VARA does not protect site-specific art and then permit its destruction by removal from its site pursuant to the statute's public presentation exception. VARA does not apply to site-specific art at all."[64]

57. *Martin*, 982 F. Supp. at 635.

58. *Id.*

59. 17 U.S.C. § 106A(c) (2012).

60. 459 F.3d 128 (1st Cir. 2006).

61. *Id.* at 134 (citing Francesca Garson, Note, *Before That Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203, 239 (2001)).

62. *Id.* at 134–35.

63. *Id.* at 142.

64. *Id.* at 143.

A contrary holding would pose a problem for property law. The owner of land where a site-specific work of art sits would not have the right to move the art without the artist's consent.[65]

2. Obstruction of View

Additionally, obstructing the view of a work of art does not amount to a VARA violation. In *English v. BFC & R East 11th Street LLC*,[66] six artists claimed that the development of a property violated their VARA rights because it would "obliterat[e] [the] visual artwork from view [which] is the equivalent of destroying it."[67] However, the United States District Court for the Southern District of New York held that obstructing the view of the art did not constitute mutilation or destruction.[68]

The court's holding was rooted in constitutional and public policy concerns. The court explained that extending VARA in this way could create conflict among real property owners. For example, a real property owner could put artwork on their property to prevent a neighbor form developing their land.[69]

E. Waiver of Moral Rights

Artists may choose to waive their rights under VARA.[70] A waiver requires a written instrument. The artist must sign the instrument and the instrument must specify the work of art to which it applies.[71]

Waiver would typically occur at the time of commission or purchase of the work of art.[72] An artist may opt to waive his moral rights to negotiate a higher price for his artwork.[73] Indeed, artists often must choose between keeping their VARA rights and receiving a larger paycheck. This may also lead to the artist automatically waiving his moral rights for the sake of the transaction going forward.[74]

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65. *Id.*

66. No. 97 Civ. 7446(HB), 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom.* English v. BFC Partners, 198 F.3d 233 (2d Cir. 1999).

67. *Id.* at *6.

68. *Id.*

69. *Id.*

70. 17 U.S.C. § 106A(e) (2012).

71. *Id.*

72. Cunard, *supra* note 22, at 6.

73. Thurston, *supra* note 17, at 717.

74. *Id.* at 714.

F. Ninety-Days' Notice

Additionally, for artwork that is incorporated into a building, the building owner must make a "'diligent, good faith' attempt to notify the artist of its intention to remove the work."[75] The artist will have ninety days to remove the art or pay for its removal.[76] If the artist does not make these efforts within ninety days, then the artist will no longer have a VARA claim related to the removal of the artwork.[77]

G. VARA Impairing Artist Rights

Overall, VARA may be more harmful than helpful to artists. Artists will find themselves without the benefits of VARA in three situations: when the artwork is not considered a work of art within VARA's definition;[78] when VARA rights are not violated;[79] and when VARA rights are waived.[80] Indeed, the hurdles that an artist must surpass in order to successfully engage his VARA rights put the true purposes of VARA in question; what incentive do artists have to create art and share it with the world? At every turn, VARA can strip away an artist's moral rights that it purports to create.

II. GOVERNMENT IMMUNITY FROM VARA VIOLATIONS

In addition to VARA's limitations discussed in Part I of this Note, another hurdle that artists face is the potential that government actors are immune from VARA violations. Part II discusses states' sovereign immunity. It questions the validity of Congress' attempt to abrogate states' sovereign immunity from violating various copyright statutes, including VARA. Based on the Supreme Court's holdings on congressional power to abrogate sovereign immunity, it appears that the government is immune from any claim arising out of a VARA violation.

75. 17 U.S.C. § 113(d)(2) (2012); *see also* Swanlund, *supra* note 19; Cunard, *supra* note 22, at 7.

76. § 113(d)(2)(B); *see also* Cunard, *supra* note 22, at 7.

77. § 113(d)(2)(B); *see* Swanlund, *supra* note 19. The 5Pointz developer discussed in the introduction could have saved millions had he given the graffiti artists ninety-days' notice, instead of rashly whitewashing the graffiti murals.

78. *See supra* Part I.C.

79. *See supra* Part I.D.

80. *See supra* Part I.E.

A. Sovereign Immunity Generally

Sovereign immunity is a legal doctrine that prevents lawsuits against the government without the government's consent.[81] This doctrine, as it applies to the states, arises from the Eleventh Amendment of the Constitution.[82] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[83]

Under certain circumstances, Congress may abrogate sovereign immunity, and thus consent to a lawsuit against the government. Issues of federalism arise, however, when Congress attempts to abrogate sovereign immunity of the states. Like the federal government, states retain their own independent sovereign immunity and Congress does not have the power to simply "override" state sovereignty.[84]

Under certain circumstances, however, Congress may abrogate state sovereign immunity and permit lawsuits against a state. In *Seminole Tribe of Florida v. Florida*,[85] the Supreme Court explained that Congress must meet two conditions to abrogate state sovereign immunity. First, Congress must "unequivocally express[] its intent to abrogate the immunity."[86] Second, Congress must act "pursuant to a valid exercise of power."[87] While the former may be easy to evaluate based on the plain language reading of Congress' act, the latter involves a constitutional analysis.

In *Seminole Tribe*, the Supreme Court suggested that the second condition of abrogation is limited to Congress' reliance on amendments adopted after the Eleventh Amendment.[88] Thus, Congress could abrogate state sovereign immunity when Congress exercises its Section 5 of the power as against the states. The Supreme Court reasoned that the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the

81. United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)); *see also* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)) (explaining that states are also immune from lawsuits regardless of state citizenship of the individual suing).

82. *Garrett*, 531 U.S. at 363 (quoting U.S. CONST. amend. XI).

83. U.S. CONST. amend. XI.

84. Alden v. Maine, 527 U.S. 706, 732 (1999).

85. 517 U.S. 44 (1996).

86. *Id.* at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

87. *Id.*

88. *Id.* at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976)).

Eleventh Amendment."[89] Indeed, the Fourteenth Amendment "contained prohibitions expressly directed at the States."[90] Furthermore, Section 5 of the Fourteenth Amendment authorized Congress to enforce the Fourteenth Amendment through appropriate legislation.[91]

In coming to this conclusion in *Seminole Tribe*, the Supreme Court overruled *Pennsylvania v. Union Gas Co.*,[92] which previously permitted Congress to abrogate state sovereign immunity through Congress' exercise of its Article I Commerce Clause power.[93] In brief, Congress could not apply its powers defined under any antecedent provision of the Constitution—such as Article I—to justify abrogation of states' sovereign immunity.[94]

B. Determining Government Immunity from VARA

In 1990, Congress enacted the Copyright Remedy Clarification Act ("CRCA")[95] in an attempt to abrogate state sovereign immunity for VARA and other copyright violations. CRCA states:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.[96]

Since its enactment, several federal courts have questioned CRCA's constitutionality, holding that Congress' enactment of CRCA failed to pass the two-prong test announced in *Seminole Tribe*. While many courts have found that Congress met the first prong for congressional abrogation—that Congress had intended for CRCA to abrogate state immunity from copyright violations—there is debate regarding whether

89. *Seminole Tribe*, 517 U.S. at 65–66 (citing *Fitzpatrick*, 427 U.S. at 454).

90. *Id.* at 59 (quoting *Fitzpatrick*, 427 U.S. at 453).

91. *Id.*

92. 491 U.S. 1 (1989).

93. *Seminole Tribe*, 517 U.S. at 45; *see also Union Gas*, 491 U.S. at 23.

94. *Id.* at 66 (quoting *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)).

95. 17 U.S.C. § 511 (2012).

96. § 511(a).

Congress met the second prong.[97] Specifically, courts have questioned whether Congress acted within its constitutional authority under Section 5 of the Fourteenth Amendment when enacting CRCA.[98]

1. Article I

Some courts have suggested that Congress, unwittingly, acted under Article I instead of Section 5 of the Fourteenth Amendment to abrogate sovereign immunity under CRCA.[99] At the time of CRCA's enactment in 1990, the Supreme Court had not yet decided *Seminole Tribe*. Therefore, Congress' ability to abrogate state sovereignty using Article I powers was not limited by the *Seminole Tribe* holding.[100] Thus, in enacting CRCA prior to the *Seminole Tribe* decision, Congress chose to act through its Article I power. The House Report on CRCA explained:

> Congress has authority under its Article I powers to abrogate State sovereign immunity. Congress' power under the Fourteenth Amendment has been repeatedly upheld, but in *Pennsylvania v. Union Gas*, the Court held that Congress has the power to abrogate under the Commerce Clause of Article I. The Committee believes that the *Union Gas* reasoning applies equally to the Copyright Clause of Article I.[101]

While Congress may have relied on the Court's decision in *Union Gas* when it enacted CRCA in 1990, the 1996 *Seminole Tribe* decision demonstrates that Congress's attempt to abrogate state sovereign immunity with CRCA is now unconstitutional.

2. Section 5 of the Fourteenth Amendment

Even when considering the possibility that Congress enacted CRCA through Congress' exercise of its Fourteenth Amendment Section 5 power, CRCA does not validly abrogate state immunity under the Eleventh Amendment.

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97. *See, e.g.*, Chavez v. Arte Publico Press, 204 F.3d 601, 603, 607–08 (5th Cir. 2000); Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1314–15 (11th Cir. 2011); Mktg. Info. Masters, Inc. v. Bd. of Trs. of Cal. State Univ. Sys., 552 F. Supp. 2d 1088, 1095 (S.D. Cal. 2008); InfoMath, Inc. v. Univ. of Ark., 633 F. Supp. 2d 674, 678–80 (E.D. Ark. 2007). *But see* Jacobs v. Memphis Convention & Visitors Bureau, 710 F. Supp. 2d 663, 670–72 (W.D. Tenn. 2010); Coyle v. Univ. of Ky., 2 F. Supp. 3d 1014, 1017 (E.D. Ky. 2014).

98. *Jacobs*, 710 F. Supp. 2d at 670–71; *Coyle*, 2 F. Supp. 3d at 1017–18.

99. *See Nat'l Ass'n of Bds. of Pharmacy*, 633 F.3d at 1313.

100. 17 U.S.C. § 511 (2012); *Seminole Tribe*, 517 U.S. at 44.

101. H.R. REP. NO. 101-282, at 7 (1989) (citation omitted).

a. Standard for Section 5 Abrogation

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[102] the Supreme Court considered whether Congress properly exercised its Section 5 power when it enacted the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act").[103] Through the Patent Remedy Act, Congress intended to abrogate state sovereign immunity to patent violations.[104]

The Court explained that, for Congress to invoke Section 5, the legislative branch must first identify a violation that it intends to remedy.[105] Second, Congress must consider whether an adequate state remedy already exists.[106] The Court explained that only when no adequate state remedy existed could Congress enact legislation to enforce the Fourteenth Amendment.[107] Third, Congress' Section 5 legislation must be proportional to the remedial or protective goal.[108]

Applying this test, the Court held that Congress had not validly enacted the Patent Remedy Act through its Section 5 power. The Court looked for, but did not find, a pattern of patent violations for Congress to remedy.[109] Further, Congress did not adequately consider alternative state remedies.[110] In fact, witnesses could provide evidence only that the available state remedies were less convenient than federal remedies—not that the state remedies were constitutionally inadequate.[111] Finally, the Court explained that the Patent Remedy Act was overly broad because Congress did nothing to limit the coverage of the Act solely to constitutional violations or only certain kinds of infringement.[112]

102. 527 U.S. 627 (1999).

103. *Id.* at 630–31 (citing 35 U.S.C. § 271(a) (1988)).

104. *See id.* at 633. Like Congress' enactment of CRCA, Congress enacted the Patent Remedy Act prior to the Supreme Court's decision in *Seminole Tribe*. *See id.* at 630. Congress claimed to have enacted the Patent Remedy Act through both its Article I power and its Section 5 power. Because *Seminole Tribe* prevented Congress from abrogating state sovereign immunity through its Article I powers, the Supreme Court evaluated only Congress' use of its Section 5 power. *Id.* at 635–36.

105. *Id.* at 639–40 (citing City of Boerne v. Flores, 521 U.S. 507, 525 (1997)).

106. *Id.* at 640.

107. *Id.* at 643.

108. *See id.* at 639 (citing *City of Boerne*, 521 U.S. at 532).

109. *Id.* at 640.

110. *Id.* at 643 ("Congress . . . barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment.").

111. *Id.* at 644.

112. *Id.* at 646–47.

In *Nevada Department of Human Resources v. Hibbs*,[113] Congress properly used its Section 5 power to abrogate state sovereign immunity from Family and Medical Leave Act ("FMLA") claims regarding gender-based discrimination.[114] In *Hibbs*, unlike in *Florida Prepaid*, the Supreme Court considered state law and policies, a Bureau of Labor Statistics survey, and testimony presented to Congress to describe a gender-based discriminatory pattern.[115] The Court held that the states' unconstitutional patterns justified the enactment of prophylactic Section 5 legislation.[116] The Court further determined that Congress' abrogation of state sovereign immunity from FMLA claims was "congruent and proportional to the targeted violation."[117] Indeed, Congress had already unsuccessfully attempted to solve this problem through Title VII and the Pregnancy Discrimination Act.[118] The Court stressed that Congress' enactment of FMLA, while it limited some constitutional action, was narrow in scope and therefore reasonably met Congress' objective of reducing gender-based discrimination.[119]

b. Applying Section 5 Analysis to CRCA

Applying the Supreme Court's standards in *Florida Prepaid* and *Hibbs*, it appears that Congress could not have properly invoked its Section 5 power when it enacted CRCA.

In *Chavez v. Arte Publico Press*,[120] the United States Court of Appeals for the Fifth Circuit provided a thorough analysis of the CRCA's constitutionality. In this case, an author sued the University of Houston for infringing her copyright when the university continued to publish her work without her permission.[121] The university, as a state institution, claimed immunity.[122] The Fifth Circuit held that the university was immune from suit over the copyright violation because Congress failed to constitutionally abrogate state sovereign immunity from this copyright claim.[123]

113. 538 U.S. 721 (2003).

114. *Id.* at 734–35.

115. *Id.* at 730–32.

116. *Id.* at 735.

117. *Id.* at 737.

118. *Id.*

119. *Id.* at 739–40.

120. 204 F.3d 601 (5th Cir. 2000).

121. *Id.* at 603.

122. *Id.*

123. *Id.* at 607–08.

First, the Fifth Circuit concluded that Congress did not identify a pattern of states violating copyright laws or constitutional rights.[124] The House Committee on the Judiciary discussed the *possibility* of states violating copyright law but admitted that "there have not been any significant number of wholesale takings of copyright rights by [s]tates or [s]tate entities"[125] and that "[s]tates are not going to get involved in wholesale violation of the copyright laws."[126]

Second, unlike in *Hibbs*, where Congress had considered other failed attempts to remedy the constitutional violation,[127] Congress did not adequately consider alternative state remedies to CRCA.[128] In fact, the Committee on the Judiciary considered providing states with concurrent jurisdiction, but, rather than exploring this alternative, Congress rejected the idea and determined that concurrent jurisdiction would result in differing standards across states.[129]

Third, Congress' enactment of CRCA, like the Patent Remedy Act, was overly broad.[130] In *Florida Prepaid,* the Supreme Court explained that Congress' enactment of the Patent Remedy Act was overbroad because Congress considered both intentional and unintentional patent violations.[131] The Court reasoned that patent violations can be either intentional or unintentional,[132] but violations of the Due Process Clause of the Fourteenth Amendment require intent—a state actor can deprive a person of property within the meaning of the Due Process Clause only if the state actions are intentional, not unintentional.[133] As a result, the Patent Remedy Act covered violations that went beyond the coverage of the Due Process Clause.[134] Similarly, the Fifth Circuit reasoned that

124. *Id.* at 605.

125. *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liab. of States: Hearings on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 48 (1989) (statement of Rep. Kastenmeier, Chairman, Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary).

126. *Id.* at 53 (statement of Robert W. Oman, Register of Copyrights, Library of Congress).

127. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003).

128. *Chavez*, 204 F.3d at 606–07.

129. H.R. REP. NO. 101-282, at 9 (1989).

130. *Chavez*, 204 F.3d at 607.

131. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646–47 (1999).

132. *Id.* at 645.

133. *Id.* (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)).

134. *Id.* at 645–46.

Congress did not take any steps to limit the scope of CRCA to cover only intentional copyright violations.[135]

In sum, Supreme Court precedent suggests that when Congress enacted CRCA, Congress did not validly exercise its Section 5 power. CRCA, therefore, fails to abrogate state sovereign immunity for copyright violations, including VARA violations.

3. VARA Implications

Without CRCA abrogating states' sovereign immunity, state governments cannot be held accountable for VARA violations. Artists have no right of action against the government for violating the artists' moral rights. The government has full authority to alter or destroy any work of art that it owns.

This is devastating to artists who sell or donate their artwork for public use. An artist may even refrain from producing and sharing his artwork with the government because he has no guarantee that his artwork and his reputation will be protected.

III. GOVERNMENT SPEECH AS AN ADDITIONAL LIMITATION ON ARTISTS' RIGHTS

The government-speech doctrine further limits artists' rights to their publicly displayed works of art. While Part II of this Note focused on when the government owns a work of art and argued that the government is immune from violating VARA, Part III explains that the government can restrict the placement of a publicly displayed work of art, regardless of whether the government owns it.

A. Government Speech Background

The First Amendment restricts the government from enacting any law "abridging the freedom of speech."[136] Though the Constitution prevents the government's restriction of private speech, it does not limit government speech.[137] The government-speech doctrine allows the government to promote its own policy and positions without having to articulate the opposing side of issues.[138] Indeed,

> [t]he government-speech doctrine is unique among First Amendment law in that it is the only situation in which the *government may discriminate* on the basis of the speaker's

135. *Chavez*, 204 F.3d at 607.

136. U.S. CONST. amend. I.

137. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)).

138. *See id.* at 467–68 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

> viewpoint. In its most basic application, it is noncontroversial: the government itself may adopt policy positions and promote them without having to equally promote opposing policies advocating the opposite viewpoint. In all other contexts, the government cannot deny a speaker access to a forum or otherwise punish them because of a disagreement with the views expressed.[139]

Thus, the government may choose its own viewpoints on various issues and determine what it wishes to speak.

B. Implications for Public Monuments and Art

In *Pleasant Grove City v. Summum*,[140] the Supreme Court held that permanent, public monuments located on public property constitute government speech.[141] In *Summum*, a religious group sued Pleasant Grove City after the city denied the religious group's request to erect a monument similar to the Ten Commandments statue in a public park.[142] However, the Supreme Court concluded that the city did not violate the religious group's First Amendment rights because the monument was government speech.[143]

The Court explained that when a monument is on private property, an onlooker would have no difficulty interpreting the monument as a message from the property owner.[144] The Court rationalized that the public would make a similar assumption for public spaces—concluding that public monuments are messages from the government.[145] Indeed, "[g]overnments have long used monuments to speak to the public."[146]

It is not a far stretch from the Supreme Court's holding in *Summum* to conclude that public art is also government speech. Needless to say, many permanent, public monuments are sculptures, murals, or other forms of art. Beyond that point, public art is government speech

139. David Greene, *Supreme Court Rejects Expansion of Government-Speech Doctrine in Tam Case*, Electronic Frontier Foundation (June 19, 2017) (emphasis added), https://www.eff.org/deeplinks/2017/06/supreme-court-rejects-expansion-government-speech-doctrine-tam-case [http://perma.cc/L8P8-LJEJ].

140. 555 U.S. 460 (2009).

141. *Id.* at 470.

142. *Id.* at 465–66.

143. *Id.* at 481.

144. *Id.* at 471.

145. *Id.*

146. *Id.* at 470.

because the purpose of public art is to convey messages to onlookers.[147] As with permanent monuments erected on public lands, onlookers admiring a publicly placed work of art may identify the government, not the artist, as the entity conveying the art's message to the public. Thus, if an artist were to challenge the government's authority to remove, relocate, or install art located on public land, then the government would likely prevail, even if the government does not own the work of art.

IV. UNDERMINED VARA RIGHTS

The graffiti once at 5Pointz marked a victory for the art world. Finally, the artistic expressions of graffiti artists, whose work stood on public display as an attraction for thousands of daily visitors,[148] were acknowledged as works of recognized stature.[149] However, this victory is the exception and not the rule for most artists. VARA's limitations, the government's immunity from VARA violations, and government speech collectively contradict VARA's very purpose and inhibit artists seeking to protect their artwork.

Public art demonstrates the importance of VARA's underlying purposes. Namely, VARA aims both to encourage artists to make and disseminate public art and to benefit the public who observes and interprets artists' work.[150] However, as Part IV discusses, these goals are undermined. As a result, artists are discouraged from creating artwork and society at large fails to reap the benefits of public art. The following subsections explain how VARA's goals are undermined.

A. Discouraging the Creation of Art

VARA's primary goal is to encourage artists to create and disseminate more art.[151] To achieve this goal, VARA purportedly protects artists' moral rights, including artists' rights to prevent the mutilation and destruction of their art and to protect their reputations.[152]

147. *What is Public Art?*, ASS'N FOR PUB. ART, http://www.associationforpublicart.org/what-is-public-art/ [https://perma.cc/RM8C-B4YC] (last visited Aug. 28, 2018).

148. Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 433 (E.D.N.Y. 2018), *appeal filed*, No. 18-538 (2d Cir. Feb. 23, 2018).

149. *Id.* at 438–39; *see also id.* at 449–96 (providing photographs of the graffiti artists' work prior to being whitewashed and destroyed).

150. *See supra* Part I.A (discussing justifications for VARA).

151. *See supra* Part I.A.

152. *See supra* Part I.B (discussing the protection of artists' moral rights in their artwork under VARA).

Artists, however, must surpass numerous hurdles before they can take advantage of VARA's protections. Notably, VARA explicitly limits what qualifies as a work of visual art.[153] Not only are numerous forms of art excluded,[154] but the courts are left to determine when a work of art is of "recognized stature."[155] Moreover, the judicially crafted, two-prong test for "recognized stature" as announced in *Carter v. Helmsley-Spear, Inc.*[156] is unpredictable and impossible to apply consistently.[157] Even experts will fail to apply the *Carter* test consistently.[158] As a result, artists are less likely to pursue VARA claims for fear that their works of art do not qualify as works of recognized stature.

Furthermore, in many circumstances, artists are unable to prevent the destruction of their artwork even when it is a work of recognized stature. At nearly every turn, an artist's VARA violation claim will likely be denied. For example, VARA's statutory language requires that a violator of VARA act with intent or gross negligence.[159] If the artist can only prove that his art was destroyed through mere negligence or by accident, then the artist does not have a valid VARA claim.

Even if the artist can prove intent and indeed has a valid VARA claim, he cannot successfully pursue that claim against the government.[160] CRCA does not validly waive states' sovereign immunity from VARA violations.[161] Thus, when the government owns artwork, it has full authority to destroy or modify the artwork. Even when the government does not own the work of art, the government, not the artist, has the final say in determining if the art can be displayed

153. *See supra* Part I.C.

154. *See* 17 U.S.C. § 101 (2012) (defining "work of visual art").

155. *See* 17 U.S.C. § 106A(a)(3)(B) (2012) (introducing the term "recognized stature"); *see also supra* Part I.C.2 (discussing how courts define "recognized stature").

156. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part on other grounds*, 71 F.3d 77 (2d Cir. 1995).

157. *See id.* at 325 (explaining what "recognized stature" means but failing to provide a bright-line rule).

158. *See id.* at 325–26 (illustrating the differences in expert opinions).

159. 17 U.S.C. § 106A(a)(3)(B).

160. *See supra* Part II.B.2 (discussing CRCA's failure to abrogate state sovereign immunity for copyright violations); *see also supra* Part II.B.3 (discussing VARA implications for state governments).

161. *See supra* Part II.B.

on public property.[162] As a result, the government has the power to greatly influence, and possibly harm, an artist's reputation.

Interestingly, the government would harm an artist more if the government destroyed an artist's publicly displayed art than if the government destroyed the artist's privately displayed art.[163] The public would observe the destruction of publicly displayed art. As a result, the government's actions would have a greater impact on the artist's reputation.[164]

Finally, VARA provides artists only ninety days' notice to relocate their artwork.[165] In many circumstances, however, this would not be enough time to raise enough funds to relocate art that is part of a building or structure. For example, even if the 5Pointz graffiti artists had been given ninety days' notice, it would have been difficult—though not impossible—to remove nearly eighty works of art from the 5Pointz warehouse walls and relocate them elsewhere within such a short time period.[166]

While in rare circumstances artists may benefit from VARA, the statute does not expand artists' moral rights to such an extent that would further encourage artists to produce more art.

B. Hindering Societal Benefits

VARA's second goal is to increase public access to art for society's benefit. To state the obvious, public art is purposefully available to the public; it is placed within plain view for the public to experience and interpret.[167] Often, public art "reflect[s] . . . how we see the world—the artist's response to our time and place combined with our own sense of who we are."[168]

Essential to public art is location. The graffiti at 5Pointz illustrated this. The graffiti was well-recognized because of its prime location, visible from the 7-train that transported commuters between Queens

162. *See supra* Part III.B (discussing the implications for public monuments and art).

163. Thurston, *supra* note 17, at 719.

164. *Id.*

165. 17 U.S.C. § 106A(a)(3) (referencing 17 U.S.C. § 113(d) (2012)).

166. Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 443–44 (E.D.N.Y. 2018) (discussing an expert conservator's testimony that salvaging the graffiti at 5Pointz would have been feasible), *appeal filed*, No. 18-538 (2d Cir. Feb. 23, 2018).

167. *What is Public Art?*, *supra* note 147.

168. *Id.*

and Manhattan, allowing millions of travelers to observe the graffiti-covered walls.[169]

In terms of location, though, VARA falls short again. Judicial interpretation of VARA provides that moral rights do not extend to site-specific works of art,[170] even though preserving the art's location promotes the public's access to the works of art.[171] Thus, while VARA provides protections to some works of art, it provides no protections to what makes public art *public*.

Additionally, states' sovereign immunity from VARA violations and the government-speech doctrine enable the government to limit and control artistic expression. When the government owns a work of art, sovereign immunity from VARA fails to prevent the government from destroying or modifying that work of art.[172] Even if the government does not own the work of art, the government can still control whether or not the artwork is placed on public property for the public to observe.[173] Not only is the artist left with no recourse against the government, but society is also subjected to the whims of the government's decisions regarding the public artwork.

As sovereign immunity and government speech apply to public art, they allow the government to put forth its own agenda at the expense of artistic expression. They patronize society, suggesting that the public is unable to distinguish between artistic expression and government messages. Rather than allow artists to cultivate an artistic environment, some of which may even offend traditional notions in society,[174] the government can sensor what the public experiences and, thus, hinder societal development.

V. RECOMMENDATIONS TO IMPROVE VARA

Simple changes to VARA's statutory language would better achieve VARA's original purposes as well as combat the government's overreaching authority into public artistic expression.

169. *Cohen*, 320 F. Supp. 3d at 445.

170. *See supra* Part I.D.1 (explaining that relocating an artist's work does not by itself constitute a violation of VARA).

171. Thurston, *supra* note 17, at 720 (citing Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 106 (1997)) ("In enacting VARA, Congress intended the public, not just the artist and property holder, to benefit from preservation of art works. The residual effects of destroying a work of art are two-fold. Not only is the public denied access to the work, but also future works created in response to the work may be thwarted.").

172. *See supra* Part II.B.3.

173. *See supra* Part III.B (describing artwork as a form of government speech).

174. *See What is Public Art?*, *supra* note 147.

A. Replacing "Recognized Stature"

To start, VARA's narrow scope is partially the result of confusion surrounding courts' capricious interpretations of VARA's "recognized stature" requirement.[175] This problem would be alleviated if VARA's "recognized stature" provision were replaced with a monetary-value requirement. For example, the statute could require that a work of art exceed a certain price value in order to qualify for VARA protections. Though opinions regarding the value of art would differ from person to person, a monetary value for the work of art would serve as a threshold to establish a minimum qualification for VARA protection. Next to address is whether the threshold value should be higher, and therefore under-inclusive, or lower, and therefore over-inclusive.

With this standard, artists could determine when their art does and does not qualify for VARA protections. Further, a reasonable-cost threshold would encourage artists to invest in—and produce more—elaborate works of art because artists would feel certain that they could protect better their art and their reputations.

B. Implementing Location-Specific Protections

VARA should be amended to incorporate site-specific protections. Without these protections, artists are often left powerless to real property owners and the government.[176]

This provision should distinguish between art that is merely located in public and art that is integrated into its specific location. The First Circuit explained that, "[i]n a work of 'site-specific art,' one of the component physical objects is the location of the art. To remove a work of site-specific art from its original site is to destroy it."[177] On the other hand, art that is not site-specific could be relocated without damaging the work of art itself.

Incorporating site-specific protections aligns with VARA's purposes. These protections would encourage artists to create more site-specific art from which the public would benefit. More importantly, this provision would counterbalance the government-speech doctrine and states' immunity from VARA that already give the government the authority to relocate public works of art.

C. Extending the Ninety-Days'-Notice Provision

VARA's ninety-days'-notice provision may not provide an artist adequate time to coordinate the removal of his artwork or to obtain

175. 17 U.S.C. § 106A(a)(3)(B) (2012); *see supra* Part I.C.2 (explaining the limitations of what qualifies as a work of recognized stature).

176. *See* Garson, *supra* note 61, at 240–41.

177. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 129 (1st Cir. 2006).

funding to relocate his artwork.[178] Determining the appropriate notice period is difficult because each work of art is unique. Rather than arbitrarily adjusting the notice period, VARA should be amended to require that the building owner pay for a portion of the costs associated with removing the art. If the artist chooses to not relocate his work of art, then the building owner should pay the artist the amount that the owner would have owed if removal occurred.

This amendment would provide artists an incentive and a means to relocate their art if a building owner wishes that the art be removed. Further, the amendment would encourage the owner to keep the artwork, rather than commence the expensive and time-consuming process of removing the artwork. In either circumstance, the public is more likely to benefit from the work of art because it would not be destroyed.[179]

D. Abrogating States' Sovereign Immunity

Though the Supreme Court has not held CRCA to be unconstitutional, other Supreme Court cases demonstrate that Congress did not appropriately abrogate states' immunity when it enacted CRCA.[180] Although Congress intended to abrogate states' sovereign immunity to various copyright violations when it enacted CRCA, Congress did not appropriately use its power in doing so.[181] Congress should take steps to remedy its failed attempt.

In fact, the Supreme Court's *Florida Prepaid* decision provides instructions to Congress that explain how to abrogate state immunity under Section 5 of the Fourteenth Amendment.[182] Unlike when it enacted CRCA, Congress will need to provide evidence of the evil that it intends to remedy, specifically state violations of VARA.[183] Congress will also have to demonstrate that it considered alternatives that were ineffective in preventing the states from violating artists' due process rights provided under VARA.[184]

Finally, Congress will have to narrowly define the scope of the states' abrogation.[185] Not only is CRCA broader than the Fourteenth

178. *See* 17 U.S.C. § 113(2)(B) (2012) (acknowledging the repercussions for an artist who fails to remove his artwork or pay for its removal).

179. *See supra* Part I.A (describing the justifications for VARA).

180. *See supra* Part II.B.

181. *See supra* Part II.B.

182. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639–40 (1999).

183. *Id.* at 639–40 (citing City of Boerne v. Flores, 521 U.S. 507, 525 (1997)).

184. *See id.* at 643.

185. *Id.* at 647 (citing City of Boerne, 521 U.S. at 532–33).

Amendment Due Process Clause[186] but it is also broader than what constitutes a VARA violation. For example, CRCA includes both intentional and unintentional violations; whereas, VARA considers only intent and gross negligence.[187] While VARA's mental state requirements may limit what qualifies as destruction, these limitations provide Congress a framework for enacting a proportional abrogation statute. If Congress' abrogation statute only included intentional violations, then the abrogation of states' sovereign immunity would not be overbroad and artists could pursue VARA claims against the government.[188]

CONCLUSION

Before VARA, artists had no way of protecting their artwork after it left their hands. Though VARA attempted to remedy this injustice, it falls short of helping most artists. Especially given the states' immunity from VARA violations and the government's ability to control public art through the government speech doctrine, many artists are left hopeless when their art is either sold or displayed publicly. Clarifying the requirements for art to qualify for VARA protections, implementing site-specific protections, incentivizing property owners to contribute to preserving art on their properties, and successfully abrogating states' immunity from VARA violations would provide artists with meaningful moral rights to their artwork.

With these changes, the 5Pointz graffiti case would not be a VARA success story. Rather, the VARA success story would be about artists who enforced their VARA rights and *prevented* the destruction of their works of art.

Rachel Ippolito[†]

186. *Chavez*, 204 F.3d at 607.

187. 17 U.S.C. § 106A(a)(3) (2012); s*ee also Chavez*, 204 F.3d at 607 (analogizing with *Florida Prepaid*, in which the Court stated that the mental state requirements rendered the Patent Remedy Act overly broad, which in turn suggests that CRCA also is overly broad).

188. Though this recommendation may provide Congress an opportunity to enact a statute that is proportional and congruent to VARA's purposes, more research will have to be done to determine whether states are violating VARA and to consider possible alternatives to abrogation.

† J.D. Candidate, 2019, Case Western Reserve University School of Law. I would like to thank Professor Emeritus Jonathan L. Entin for his thoughtful comments throughout the writing of this Note and the Editors of Volume 69 for all their hard work in preparing this piece for publication. I would also like to thank my family for their never-ending support and encouragement.